

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHIELA M. WILLCUTT,)
Plaintiff,) No. CV-08-3058-CI
v.) ORDER GRANTING PLAINTIFF'S
MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
of Social Security,) AND DENYING DEFENDANT'S
Defendant.) MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 27, 30.) Attorney D. James Tree represents Shiela Willcutt (Plaintiff); Special Assistant United States Attorney Terry E. Shea represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and **REMANDS** the matter to the Commissioner for calculation and immediate award of benefits.

JURISDICTION

Plaintiff filed her third claim for Supplemental Security Income (SSI) on October 29, 2003. (Tr. 213-16.) She alleged disability due to asthma, depression, neck and back surgery, diabetes, high blood pressure, high cholesterol, and carpal tunnel

1 syndrome, with an alleged onset date of May 2002. (Tr. 271, 318.)
2 In February 2006, she amended her alleged onset date to October 26,
3 2004, when she could no longer work due to pain. (Tr. 240.) Her
4 claim was denied initially and on reconsideration. Plaintiff
5 requested a hearing before an administrative law judge (ALJ), which
6 was held on December 14, 2005, before ALJ Mary Bennett Reed. (Tr.
7 721-57.) Plaintiff, who was represented by counsel, and vocational
8 expert Deborah Lapoint (VE) testified. The ALJ denied benefits on
9 January 26, 2007, and the Appeals Council denied review. (Tr. 21-
10 28, 9-11.) The instant matter is before this court pursuant to 42
11 U.S.C. § 405(g).

12 **STATEMENT OF THE CASE**

13 The facts of the case are set forth in detail in the transcript
14 of proceedings, and are briefly summarized here. At the time of the
15 hearing, Plaintiff was 38 years old, unmarried, and had three of her
16 young children living with her. (Tr. 726, 740.) She had a tenth
17 grade education and vocational training. (Tr. 277.) She had had
18 five surgeries since 2000: a cervical fusion, two lumbar procedures,
19 and bilateral carpal tunnel procedures. (Tr. 327, 334, 353, 359,
20 730.) She stated she used a nebulizer and took numerous
21 medications. (Tr. 731.) Plaintiff testified she had past work
22 experience as a food server, prep cook, deli worker, house cleaner,
23 laundry worker, dry cleaning attendant, kitchen helper, and
24 cashier/checker. (Tr. 750.) She reported she could not work at the
25 laundry because of her asthma, and she had to quit her last job as
26 a house cleaner due to pain and an inability to stay on her feet.
27 (Tr. 735, 739.)
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ADMINISTRATIVE DECISION

2 The ALJ declined to reopen Plaintiff's prior SSI applications.
3 (Tr. 21.) At step one of the sequential evaluation process, the
4 ALJ found Plaintiff had not engaged in substantial gainful activity
5 since the October 26, 2004, the amended alleged onset date. (Tr.
6 23.) At step two, she found Plaintiff had severe impairments of
7 "degenerative changes of the lumbar and cervical spine post
8 surgeries, diabetes, hepatitis C, restrictive airway disease and
9 obesity." (*Id.*) She found non-severe impairments of bilateral
10 carpal tunnel syndrome status post release; hepatitis C; and mental
11 impairments. (Tr. 25.) At step three, the ALJ found Plaintiff's
12 impairments, alone and in combination, did not meet or medically
13 equal one of the listed impairments in 20 C.F.R., Appendix 1,
14 Subpart P, Regulations No. 4 (Listings). (*Id.*) She found
15 Plaintiff's statements regarding her symptoms and limitations were
16 "not credible to the extent that they would preclude the wide range
17 of light work described" in the ALJ's decision. (Tr. 26.) At step
18 four, she determined Plaintiff had the residual functional capacity
19 (RFC) to do light exertional work with "no more than occasional
20 climbing of ladders and ropes or scaffolds or more than occasional
21 stooping or crouching." The RFC also restricted Plaintiff to work
22 that "would not involve concentrated exposure to dust, fumes, odors
23 or other respiratory inhalants." (Tr. 25.) Based in part on this
24 RFC and VE testimony, the ALJ found Plaintiff was able to perform
25 her past relevant work as a short order cook, a cashier/checker and
26 as a housekeeper. (Tr. 27.) The ALJ concluded Plaintiff was not
27 under a "disability" as defined by the Social Security Act at any

1 time since the date of the amended alleged onset date. (Tr. 28.)

2 **STANDARD OF REVIEW**

3 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
4 court set out the standard of review:

5 A district court's order upholding the Commissioner's
6 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
7 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
8 Commissioner may be reversed only if it is not supported
9 by substantial evidence or if it is based on legal error.
10 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
11 Substantial evidence is defined as being more than a mere
12 scintilla, but less than a preponderance. *Id.* at 1098.
13 Put another way, substantial evidence is such relevant
14 evidence as a reasonable mind might accept as adequate to
15 support a conclusion. *Richardson v. Perales*, 402 U.S.
16 389, 401 (1971). If the evidence is susceptible to more
17 than one rational interpretation, the court may not
18 substitute its judgment for that of the Commissioner.
19 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
20 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

21 The ALJ is responsible for determining credibility,
22 resolving conflicts in medical testimony, and resolving
23 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
24 Cir. 1995). The ALJ's determinations of law are reviewed
25 *de novo*, although deference is owed to a reasonable
26 construction of the applicable statutes. *McNatt v. Apfel*,
27 201 F.3d 1084, 1087 (9th Cir. 2000).

28 **SEQUENTIAL PROCESS**

29 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
30 requirements necessary to establish disability:

31 Under the Social Security Act, individuals who are
32 "under a disability" are eligible to receive benefits. 42
33 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
34 medically determinable physical or mental impairment"
35 which prevents one from engaging "in any substantial
36 gainful activity" and is expected to result in death or
37 last "for a continuous period of not less than 12 months."
38 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
39 from "anatomical, physiological, or psychological
40 abnormalities which are demonstrable by medically
41 acceptable clinical and laboratory diagnostic techniques."
42 42 U.S.C. § 423(d)(3). The Act also provides that a
43 claimant will be eligible for benefits only if his
44 impairments "are of such severity that he is not only

unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or non-disability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff argues the

1 ALJ erred when she improperly rejected Plaintiff's testimony and
 2 improperly rejected her treating physician's medical opinions. (Ct.
 3 Rec. 28 at 10.)

4 **DISCUSSION**

5 **A. Credibility**

6 When the ALJ finds a claimant's statements as to the severity
 7 of impairments, pain and limitations are not credible, the ALJ must
 8 make a credibility determination with findings sufficiently specific
 9 to permit the court to conclude the ALJ did not arbitrarily
 10 discredit claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947,
 11 958-959 (9th Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46
 12 (9th Cir. 1991) (en banc). It is well-settled, however, that an ALJ
 13 cannot be required to believe every allegation of disabling pain,
 14 even when medical evidence exists that a claimant's condition may
 15 produce pain. "Many medical conditions produce pain not severe
 16 enough to preclude gainful employment." *Fair v. Bowen*, 885 F.2d
 17 597, 603 (9th Cir. 1989). Although an adjudicator may not reject a
 18 claimant's extreme symptom complaints solely on a lack of objective
 19 medical evidence, medical evidence is a relevant factor to consider.
 20 *Social Security Ruling (SSR) 96-7p.*

21 If there is no affirmative evidence that the claimant is
 22 malingering, the ALJ must provide "clear and convincing" reasons for
 23 rejecting the claimant's allegations regarding the severity of
 24 symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). The
 25 ALJ engages in a two-step analysis in deciding whether to admit a
 26 claimant's subjective symptom testimony. *Lingenfelter v. Astrue*,
 27 504 F.3d 1028, 1035-36 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d
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1 1273, 1281 (9th Cir. 1996). Under the first step, the ALJ must find
2 the claimant has produced objective medical evidence of an
3 underlying "impairment," and that the impairment, or combination of
4 impairments, could reasonably be expected to cause "some degree of
5 the symptom." *Lingenfelter*, 504 F.3d at 1036. Once the first test
6 is met, the ALJ must evaluate the credibility of the claimant and
7 make specific findings supported by "clear and convincing" reasons.
8 *Id.* In addition to ordinary techniques of credibility evaluation,
9 the ALJ may consider the following factors when weighing the
10 claimant's credibility: the claimant's reputation for truthfulness;
11 inconsistencies either in her allegations of limitations or between
12 her statements and conduct; daily activities and work record; and
13 testimony from physicians and third parties concerning the nature,
14 severity, and effect of the alleged symptoms. *Light v. Social Sec.*
15 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Fair*, 885 F.2d at 597
16 n.5.

17 The ALJ may also consider an unexplained failure to follow
18 treatment recommendations and testimony by the claimant "that
19 appears less than candid." *Tommasetti v. Astrue*, 533 F.3d 1035,
20 1039 (9th Cir. 2008). As explained by the Commissioner in his policy
21 ruling, the ALJ need not totally reject a claimant's statements; he
22 may find the claimant's statements about pain to be credible to a
23 certain degree, but discount statements based on his interpretation
24 of evidence in the record as a whole. *SSR 96-7p*. "For example, an
25 adjudicator may find credible an individual's statement as to the
26 extent of the functional limitations or restrictions due to
27 symptoms; i.e., that the individual's abilities to lift and carry
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1 are compromised, but not to the degree alleged." *Id.* If the ALJ's
2 credibility finding is supported by substantial evidence in the
3 record, "the court may not engage in second-guessing." *Thomas*, 278
4 F.3d at 959; *Fair*, 885 F.2d at 604 ("credibility determinations are
5 the province of the ALJ"). In any case, "once the claimant produces
6 objective medical evidence of an underlying impairment, an
7 adjudicator may not reject a claimant's subjective complaints based
8 solely on a lack of objective medical evidence to fully corroborate
9 the alleged severity of [disabling symptoms]." *Bunnell*, 947 F.2d at
10 345.

11 Here, there is no evidence of malingering. In her brief
12 credibility findings, the ALJ noted Plaintiff's allegation of
13 inability to lift a gallon of milk, unsuccessful carpal tunnel
14 releases, pain in her legs and the need to lie down after 10 minutes
15 of activity, concentration deficits and low energy. (Tr. 26.) She
16 found Plaintiff's impairments could reasonably cause the alleged
17 symptoms, but held Plaintiff's allegations were not entirely
18 credible "to the extent they would preclude the wide range of light
19 work" described in the ALJ's RFC.

20 In support of this finding, the ALJ found Plaintiff's treatment
21 history inconsistent with "disability." This reason is not
22 supported by the record. Plaintiff had three invasive surgeries on
23 her back since 2000 due to severe degenerative disc disease in her
24 neck and back. (Tr. 327-29, 352.) Since 2000, she also has had
25 bilateral carpal tunnel releases, ongoing treatment for chronic
26 respiratory infections (including numerous emergency room visits
27 with acute bronchitis or asthma symptoms and wrist pain); ongoing
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1 treatment for asthma with prednisone and a significant number of
 2 other prescription medication. (Tr. 327-36, 332, 360, 391-492, 634-
 3 44.) The ALJ's finding that a lack of adjustment or changes in her
 4 medication is not supported by the evidence, and is not a "clear and
 5 convincing" reason to discount credibility. (See, e.g., Tr. 468,
 6 631, 658-60.)

7 The ALJ also cited Plaintiff's "consistent failure" to stop
 8 heavy cigarette smoking as a reason to impugn her credibility. (Tr.
 9 26.) However, the record indicates Plaintiff made ongoing efforts
 10 to stop smoking, and at the time of the hearing, had been smoke-free
 11 for about a year and a half, with one relapse during a bout of
 12 depression. (Tr. 634, 638, 660, 732.) Given the addictive nature
 13 of cigarettes, Plaintiff's repeated attempts to quit, and relative
 14 success at the time of the hearing, this reason is not sufficiently
 15 "clear and convincing" to reject credibility. See, e.g., *Bray v.*
 16 *Commissioner of Social Security Admin.*, 554 F.3d 1219, 1227 (9th Cir.
 17 2009).

18 Likewise, linking Plaintiff's unsuccessful efforts to lose
 19 weight as evidence of a lack of motivation to work is too tenuous to
 20 discredit Plaintiff's complaints of pain and fatigue in light of the
 21 multiple surgeries and medication regime required to control her
 22 diabetes, asthma and back pain. (Tr. 26, 731, 733);¹ *Orn v. Astrue*,
 23

24 ¹ It is noted on review that the ALJ did not specifically
 25 reject Plaintiff's testimony that her medication made her sleepy and
 26 dizzy and affected her ability to concentrate. (Tr. 731, 733.) The
 27 record shows that in July 2006, Plaintiff was taking at least twelve
 28 prescriptions regularly for her impairments. (Tr. 658-59; see also

1 495 F.3d 625, 638 (9th Cir. 2007) (citing SSR 02-1p at 9.) Dr.
 2 Forster's treatment notes indicate Plaintiff was trying to lose
 3 weight and it was difficult for her. (See, e.g., Tr. 638, 719.) By
 4 the time of the hearing, she had lost 30 pounds. (Tr. 742.)
 5 Importantly, the Ninth Circuit has instructed, "[t]he failure to
 6 follow treatment for obesity tells us little or nothing about a
 7 claimant's credibility." *Orn*, 495 F.3d at 638 (citing SSR 02-1p at
 8 9.) Plaintiff's inability to lose weight is not a reason to
 9 conclude her allegations of pain and symptoms are not credible.

10 (*Id.*)

11 Finally, the ALJ finding that Plaintiff's "activities do not
 12 support her claims of disabling musculoskeletal pain is not
 13 specific, or "clear and convincing." (Tr. 26.) The ALJ supports
 14 this finding by reference to Plaintiff's ability "to work 12 hour
 15 days as late as March of 2003." This reason is misleading. Indeed,
 16 the ALJ appears to disregard her own observation at the hearing that
 17 this job was not on the earnings report. (Tr. 736.) As Plaintiff
 18 explained, she only worked at that job for two days; thus, a two day
 19 effort to work is not a daily activity that would discredit

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 21 Tr. 634, 642-43.) In addition, she was prescribed prednisone by her
 22 treating physician and emergency room physicians throughout the
 23 record as treatment for her respiratory problems. (See, e.g., Tr.
 24 422, 427, 603 659.) The ALJ did not seek additional evidence from
 25 Plaintiff's medical providers or a medical expert regarding the side
 26 effects of Plaintiff's extensive medication regime on her energy
 27 level and her ability to concentrate. The ALJ neither rejected
 28 these subjective symptoms, nor included them in her final RFC.

1 Plaintiff's allegations of disabling symptoms. The ALJ also found
 2 Plaintiff's report in March 2005 that "she was able to carry 2
 3 toddlers throughout the day," was a basis to discount Plaintiff's
 4 credibility. (Tr. 26.) However, the record shows that this was a
 5 one time notation by emergency room personnel when Plaintiff was
 6 being treated for wrist pain. (Tr. 615.) The note explains that
 7 although the cause of wrist pain and swelling was not known,
 8 Plaintiff "has two toddlers she has to carry" throughout the day.
 9 (*Id.*) As the hearing testimony indicates, it is not conclusive that
 10 Plaintiff actually stated she carried two toddlers throughout the
 11 day. (Tr. 741.) This out of context reference is not "clear and
 12 convincing" evidence of a daily activity sufficient to impugn
 13 credibility. *Reddick*, 157 F.3d at 722.

14 The ALJ's credibility findings are not "clear and convincing"
 15 and, as discussed above, medical evidence alone is not sufficient to
 16 reject credibility. *Bunnell*, 947 F.2d at 345. Therefore, the ALJ's
 17 credibility determination is not supported by substantial evidence
 18 and is based on legal error. No other evidence was identified as a
 19 basis for an adverse credibility finding; therefore, Plaintiff's
 20 improperly rejected complaints are credited as true. *Lester v.*
 21 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Gonzalez v. Sullivan*, 914
 22 F.2d 1197, 1202 (9th Cir. 1990).

23 **B. Step Four**

24 At step four, the Commissioner makes RFC findings, and
 25 determines if a claimant can perform past relevant work. In
 26 determining functional abilities, the ALJ must evaluate medical
 27 opinions, as well as the claimant's testimony. Although the burden
 28

1 of proof lies with the claimant at step four, the ALJ still has a
2 duty to make the requisite factual findings to support a conclusion.
3 *SSR 82-62*. This is done by looking at the "residual functional
4 capacity and the physical and mental demands" of the claimant's past
5 relevant work. 20 C.F.R. § 416.920 (a)(4)(iv). Past relevant work
6 is work performed in the last 15 years, lasted long enough to learn
7 it and was substantial gainful employment. *SSR 82-61*. In finding
8 that an individual has the capacity to perform a past relevant job,
9 the decision must contain among the findings the following specific
10 findings of fact:

11 1. A finding of fact as to the individual's residual
12 functional capacity;

13 2. A finding of fact as to the physical and mental demands of
14 the past job/occupation; and

15 3. A finding of fact that the individual's residual
16 functional capacity would permit a return to his or her past job or
17 occupation. *SSR 82-62*.

18 These findings must be based on the evidence in the record and
19 must be developed and fully explained in the disability decision.
20 Further, the effects of severe as well as non-severe impairments
21 must be considered by the ALJ at step four. 20 C.F.R. §
22 416.945(a)(2). The failure to do so is legal error requiring
23 remand. See *Lester*, 81 F.3d at 830.

24 Here, the ALJ's RFC determination does not discuss or include
25 limitations caused by Plaintiff's diagnosed post-traumatic stress
26 disorder (Tr. 649), or depression which was being treated with anti-
27 depressants (for smoking cessation as well as depression) during the
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1 period at issue. (Tr. 642-43, 658.) The ALJ found Plaintiff's
2 mental impairments were not severe, based the mental health
3 counselor's psychological assessment completed in July 2004, and
4 which documented Plaintiff's history of trauma and psychological
5 problems, including observed symptoms of post-traumatic stress
6 disorder. (Tr. 25, 645-49.) This evidence is consistent with
7 Plaintiff's unrejected complaints of low energy and emotional
8 distress. The effects of severe and non-severe impairments should
9 have been considered by the ALJ throughout the sequential evaluation
10 process. The ALJ's exclusion of all mental impairments and symptoms
11 throughout the sequential evaluation is legal error. 20 C.F.R. §§
12 416.926(a)(c), 416.945(a)(3).

13 In addition, because Plaintiff's testimony regarding mental
14 impairments was not properly rejected, her testimony is credited as
15 true, and symptoms should have been included in the RFC and
16 hypothetical question at step four. The hypothetical question posed
17 to the VE during the hearing was, therefore, deficient, and the VE
18 testimony relied upon is not substantial evidence to support the
19 ALJ's step four findings. *Magallanes v. Bowen*, 881 F.2d 747, 756
20 (9th Cir. 1989) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir.
21 1988)).

22 It is also noted that in determining Plaintiff's RFC, the ALJ
23 gave the state agency assessment "great weight." (Tr. 27.)
24 However, this assessment was completed on May 11, 2004, prior to the
25 amended onset date. (Tr. 519-26.) In addition, it is unclear on
26 what the non-examining agency physicians based their assessment.
27 (Tr. 520.) The ALJ also relied on a one-page letter, dated April
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1 26, 2005, from examining neurosurgeon Leslie Bornfleth, M.D. (Tr.
 2 626.) Dr. Bornfleth opined Plaintiff was capable of light to medium
 3 work after conducting a brief exam and review of imaging reports
 4 dated April 4, 2005. (Tr. 626-30.)

5 In giving weight to these non-treating physician opinions, the
 6 ALJ rejected the opinions of Charles Forster, M.D., Plaintiff's
 7 treating physician. It is well-settled that contradicted treating
 8 physician opinions cannot be rejected without "specific and
 9 legitimate" reasons. *Lester*, 81 F.3d at 830. In November 2005,
 10 Plaintiff saw Dr. Forster complaining of acute back and neck pain
 11 after coughing (due to an acute asthma attack) and a "pop" in her
 12 back. (Tr. 638.) Dr. Forster examined and noted Plaintiff's back
 13 problems in November 2005, and he indicated additional objective
 14 tests were needed for review. (Tr. 637.) He also completed a
 15 report in which he opined she was unable to work full-time, she
 16 would likely miss work four times a month, and her condition had
 17 existed since 2000.² (Tr. 639-43.) The record also indicates there
 18 was an attempt to order new imaging, but the request for a MRI was
 19 denied on November 30, 2005, by her insurance carrier. (Tr. 644.)

20 Dr. Bornfleth's conclusory and brief opinion of Plaintiff's
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22 ² Evidence received and considered by the Appeals Council
 23 includes additional reports from Dr. Forster, dated March 2003
 24 through January 2007. (Tr. 708-18.) These reports were considered
 25 by the reviewing court. *Harman*, 211 F.3d at 1179-80. The opinions
 26 expressed are consistent with the November 2005 report, which is
 27 supported by treatment notes and imaging, that Plaintiff was unable
 28 to sustain full time work.

1 condition prior to her alleged onset date is not substantial
2 evidence to reject Dr. Forster's treating source opinions based on
3 a seven year treatment history for Plaintiff's combined impairments
4 and comprehensive treatment notes and objective medical evidence.
5 Further, Dr. Bornfleth offered no opinion on Plaintiff's ability to
6 sustain work. In contrast, Dr. Forster assessed Plaintiff based on
7 a treatment history, as well as consideration of effects of her
8 medication regime, her asthma, recurrent respiratory infections,
9 blood pressure, diabetes, depression and weight problems. The ALJ's
10 reasons for disregarding Dr. Forster's well-supported opinions are
11 not legally sufficient.

12 **C. Remedy**

13 There are two remedies where the ALJ fails to provide adequate
14 reasons for rejecting the opinion of treating or examining
15 physicians. The general rule, found in the *Lester* line of cases, is
16 that "we credit that opinion as a matter of law." *Benecke v.*
17 *Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004); *Lester*, 81 F.3d at 834;
18 *Smolen*, 80 F.3d at 1291-92; *Pitzer*, 908 F.2d 502, 506 (9th Cir.
19 1990); *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989). Under
20 the alternate approach found in *McAllister v. Sullivan*, 888 F.2d 599
21 (9th Cir. 1989), a court may remand to allow the ALJ to provide the
22 requisite specific and legitimate reasons for disregarding the
23 opinion. See also *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir.
24 1990) (citing *McAllister*). The *McAllister* approach appears to be
25 disfavored where the ALJ fails to provide any reasons for
26 discrediting a medical opinion. See *Pitzer*, *supra*; *Winans v. Bowen*,
27 853 F.2d 643 (9th Cir. 1988).

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1 Case law requires an immediate award of benefits when the ALJ
2 has failed to provide legally sufficient reasons for rejecting a
3 medical opinion, and it is clear from the record that the ALJ would
4 be required to find the claimant disabled were such evidence
5 credited. *Harman*, 211 F.3d at 1178 (citing *Smolen*, 80 F.3d at
6 1292). Further, when an ALJ's reasons for rejecting the claimant's
7 testimony are legally insufficient, and it is clear from the record
8 that the ALJ would be required to determine the claimant disabled if
9 he had credited the claimant's testimony, the court will remand for
10 calculation of benefits. *Orn*, 495 F.3d at 639; *Smolen*, 80 F.3d at
11 1292 (court has the discretion to remand for award of benefits);
12 *Lester*, 81 F.3d at 834; *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th
13 Cir. 1989) (crediting claimant testimony and awarding benefits).³

14 Here, the VE testified that if Plaintiff had to lie down four
15 times a day, as opined by Dr. Forster, she would not be able to
16 sustain work. (Tr. 754.) Where the evidence establishes a
17 claimant's inability to sustain gainful employment, a finding of
18 disability is warranted. *Gatliff v. Commissioner of the Social Sec.*
19 *Admin.*, 172 F.3d 690, 694 (9th Cir. 1999). Thus, crediting
20 Plaintiff's testimony and the opinions of Dr. Forster, a finding of
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22 ³ In a recent case, the Ninth Circuit called into question the
23 remand for an immediate award of benefits where the vocational
24 expert had not addressed Plaintiff's ability to work with credited
25 limitations. *Vasquez v. Astrue*, @ 2009 WL1941485 (C.A.9 (Cal.))
26 However, in the case before this court, the VE testified that with
27 the limitations opined by Dr. Forster, Plaintiff would not be able
28 to sustain work. (Tr. 754.)

1 disabled is appropriate, and no purpose would be served by remanding
2 the case for additional proceedings. *Benecke*, 379 F.3d at 595
3 (remand so Commissioner can decide the issue again creates an unfair
4 system of benefit adjudication); *Reddick*, 157 F.3d at 729-30.
5 Accordingly,

6 **IT IS ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 27**) is
8 **GRANTED**, and the case is remanded to the Commissioner for
9 calculation and immediate award of benefits;

10 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 30**) is
11 **DENIED**;

12 3. An application for attorney fees may be filed by separate
13 motion.

14 The District Court Executive is directed to file this Order and
15 provide a copy to counsel for Plaintiff and Defendant. Judgment
16 shall be entered for Plaintiff and the file shall be closed.

17 DATED August 3, 2009.

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S/ CYNTHIA IMBROGNO
20 UNITED STATES MAGISTRATE JUDGE
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